Supreme Court, U.S.
FILED

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No.

IN THE SUPREME COURT OF THE UNITED STATES

DAVID BRAUNSTEIN, an individual,

Petitioner,

v.

UNITED STATES POSTAL SERVICE; CHARLES SMITH; and DARCY A. CEROW,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the Ninth Circuit Court of Appeals erred in affirming the district court's judgment that Petitioner's "*Bivens*" and Federal Tort Claims Act claims based on the United States' prosecution of Mr. Braunstein (that the Ninth Circuit previously determined was "frivolous" in *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002)) began to accrue prior to the "favorable termination" of *United States v. Braunstein* and were therefore barred by Arizona's two year statute of limitations.

The second question presented is whether the Ninth Circuit erred in holding that the District Court's finding in *United States v. Braunstein* on Petitioner's Motion for Attorney's Fees pursuant to the "Hyde Amendment" that the Government's prosecution was "well-grounded in fact" and "substantially justified" prevented Mr. Braunstein from asserting a *Bivens* or Federal Tort Claims Act claim until that holding was reversed by the Ninth Circuit Court of Appeals in *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002).

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PETITION FOR WRIT OF CERTIORARI

David Braunstein respectfully requests that this Court issue a *writ of certiorari* to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals for the Ninth Circuit was entered in Case No. No. 05-16390 on April 12, 2007. The unpublished opinion of the United States Court for the District of Arizona was entered on June 16, 2005, after granting the Defendants' Motions to Dismiss or In The Alternative For Summary Judgment.

STATEMENT OF JURISDICTION

The unpublished memorandum opinion of the United States Court of Appeals for the Ninth Circuit was filed in Case No. No. 05-16390 on April 12, 2007. (Appendix 1a-3a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This involves the application of the Arizona statute of limitations, Arizona Revenue Statutes § 12-542 to determine when the accrual of Mr. Braunstein's causes of actions under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971) and Federal Tort Claims Act, 28 U.S.C. § 2679(a).

STATEMENT OF THE CASE

A. Relevant Procedural History of The Case.

This case arises out of the facts and circumstances that are very thoroughly set forth in the Ninth Circuit Court of Appeals's decision, *United States v. Braunstein*, 281 F.3d 982 (9th Cir. 2002).

After the Government dismissed its criminal prosecution of Mr. Braunstein *without prejudice* on May 4, 1999, Mr. Braunstein timely filed a motion for attorney's fees under the Hyde Amendment, on the grounds that the prosecution was frivolous, vexatious and in bad faith on July 2, 1999. On October 3, 2000, the district court denied the motion, holding that the government's case was not "contrary to established law on fraud ... [and] based on the facts as they evolved, was not frivolous." Mr. Braunstein appealed the order and on February 25, 2002, the Ninth Circuit Court of Appeals reversed, finding that the case was objectively frivolous pre-indictment. The district court entered a new order granting Mr. Braunstein's Hyde Amendment motion on September 25, 2002.

Less than two years after the Ninth Circuit's published opinion and after the district court entered a new order granting Mr. Braunstein's motion for attorney's fees, Mr. Braunstein filed a civil complaint against the prosecutor in *U.S. v. Braunstein*, Darcy Cerow and her Postal Investigator, Charles Smith, on February 25, 2004 alleging constitutional torts pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). Within six months after his administrative claims to the Department of Justice and the United States Postal Service were denied, Mr.

Braunstein filed a First Amended Complaint on August 13, 2004, adding a claim against the United States and Postal Service pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2679(a) *et seq.*

However, the district court granted the respondents' motion to dismiss the First Amended Complaint and dismissed Mr. Braunstein's action on the ground that Arizona's two year statute of limitations barred Mr. Braunstein's claims.

Although Mr. Braunstein argued that there was no "favorable termination on the merits" until the Ninth Circuit held that the prosecution was frivolous, the district court reasoned that the two year statute of limitations applicable to the actions began to run on May 5, 1999, the date on which the criminal prosecution was dismissed (giving rise to the malicious prosecution and *Bivens* claims). According to the district court, the statute of limitations was then tolled from the time that the district court in *Braunstein* entered its Order Denying Mr. Braunstein's Motion for Attorney's Fees on October 3, 2000 through February 25, 2002, the date of the Ninth Circuit's published decision reversing that Order. Since approximately 17 months had elapsed from May 5, 1999 through October 3, 2000, the district court reasoned that Mr. Braunstein's complaint had to have been filed within seven months of February 25, 2002, *i.e.*, September 2002. Because Mr. Braunstein's complaint was not filed until February 25, 2004, after the trustee in bankruptcy abandoned the claim, the district court reasoned that the complaint was untimely.

B. The Court Of Appeals Memorandum Decision.

The Court of Appeals affirmed, but missed the

important point. From the time of the Government's dismissal of the criminal prosecution without prejudice on May 5, 1999 through October 3, 2000 when the District Court denied Mr. Braunstein's motion for attorney's fees, there was no favorable termination on the merits. From October 3, 2000, when the district court held that the prosecution was not only *not* frivolous but "substantially justified,"[1] through the Ninth Circuit's opinion on February 25, 2002, there was an adjudication that the prosecution did not lack "probable cause," – an element of a malicious prosecution claim and a *Bivens* claim under the Fourth Amendment. Thus, the statute of limitations could only have accrued when the Ninth Circuit determined that there was *no* probable cause and a favorable termination on the merits.

REASONS WHY THIS PETITION SHOULD BE GRANTED

This Petition raises several issues of first impression before this court, including the interplay between the Hyde Amendment and claims that naturally would follow under *Bivens* and the Federal Tort Claims Act. In addition, this petition presents the issue of when a statute of limitations begins to accrue for malicious prosecution under the FTCA and for Fourth Amendment claims pursuant to this Court's decision in *Bivens*. This Court has recently addressed a similar issue in connection with the accrual of claims for false arrest in *Wallace v. Kato*, 127 S. Ct. 1091, 1095, 1096,

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[1] "Substantially justified," as that term is used in the Equal Access to Justice Act (of which the Hyde Amendment is a part), means "a position that has a reasonable basis both in law and in fact." *Timms v. United States*, 742 F.2d 489, 492 (9th Cir. 1984). Obviously, a case cannot be "substantially justified" and yet lack probable cause.

166 L. Ed. 2d 973 (2007).

I.
MR. BRAUNSTEIN'S CAUSES OF ACTION ONLY MATURED AFTER THIS COURT'S REVERSAL OF THE DISTRICT COURT'S ORDER DENYING THE HYDE AMENDMENT MOTION

A. The Statute Of Limitations Only Begins To Run When A Plaintiff Has All Of The Elements Of His Claim.

The starting point of Mr. Braunstein's analysis is logically simple. Mr. Braunstein's suit is governed by the two-year statute of limitations in A.R.S. § 12-542. Section 12-542 provides that certain actions "shall be commenced and prosecuted within two years after the cause of action accrues." The general rule is that a cause of action accrues when all of the elements of the cause are present and damages become "irremediable". *Glaze v. Larson*, 207 Ariz. 26, 31; 83 P.3d 26 (2004) (statute of limitations for legal malpractice stemming from ineffective assistance of counsel does not run until post-conviction proceedings are finished).

In Arizona, a malicious prosecution action (which is obviously the gravamen of both Mr. Braunstein's *Bivens* and FTCA claims) therefore only accrues when the party can show (1) a favorable termination on the merits in his favor, (2) a prosecution without probable cause and (3) malice. *Frey v. Stoneman*, 150 Ariz. 106, 109; 722 P.2d 274 (1986).

1. There Was No Favorable Termination On The Merits Until This Court's Opinion.

The Government's criminal prosecution was

dismissed without prejudice on May 4, 1999. Although that dismissal clearly made Mr. Braunstein the "prevailing party" under the requirements of the Hyde Amendment, *see United States v. Gardner*, 23 F.Supp.2d 1283, 1292 (N.D.OK 1998), the term "prevailing party" as used in the Hyde Amendment is distinct from the concept of "favorable termination on the merits" pursuant to Arizona law.[2] Whether a dismissal without prejudice is a "favorable termination" was analyzed in *Frey, supra.*

In *Frey*, the Arizona Supreme Court held that a dismissal without prejudice may or may not be a favorable termination on the merits sufficient to support a malicious prosecution claim. "When a termination or dismissal indicates in some fashion that the accused is innocent of wrongdoing it is a favorable termination. However, if it is merely a procedural or technical dismissal it is not favorable." *Frey*, 150 Ariz. at 109. "The key is a termination prior to trial on the merits is favorable if it "reflects on the merits of the matter." *Id.* at 111. This "often involves questions of fact."[3] *Id.* citing Restatement (Second) of Torts,

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[2] In fact, the Government argued in opposition to Mr. Braunstein's Hyde Amendment Motion that the dismissal without prejudice was not a favorable termination on the merits, because it could re-indict him on the same charges.

[3] Thus, if the Court cannot determine as a matter of law that there was no favorable termination until this Court's decision in *U.S. v. Braunstein*, there are at least issues of fact precluding either a motion to dismiss or summary judgment. Since no evidence was presented on whether the prosecutor's decision to move for dismissal reflected "actual innocence" or some other reason, that mandates reversal. Moreover, the prosecutor's Motion to Dismiss the Indictment actually stated the opposite – that the evidence did *not* show factual innocence. *See*

§ 674, comment j (a withdrawal or a failure to prosecute is favorable in fact only when shown to be so by the surrounding circumstances). Finding that genuine issues of fact existed with regard to whether the voluntary dismissal was a favorable termination, the court reversed.

For example, courts have held that "As a matter of law, [a dismissal in the interests of justice] cannot provide the favorable termination required as the basis for a claim of malicious prosecution." *Singer v. Fulton County Sheriff*, 63 F.3d 110 (2nd Cir. 1995), citing *Hygh v. Jacobs*, 961 F.2d 359, 368 (2nd Cir. 1992).

In *Neal v. Fitzpatrick*, 250 F.Supp.2d 153 (E.D.N.Y. 2003), the court held that the dismissal without prejudice of a criminal prosecution was not a favorable termination on the merits to support a §1983 action for malicious prosecution unless the dismissal was the equivalent of a *nolle prosequi* or the statute of limitations ran.[4] The central requirement that a

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Government's Motion to Dismiss Indictment without prejudice, filed on May 3, 1999 in Case No. CR-97-582 PHX-RGS, which is subject to judicial notice by this Court ("absence of fraudulent activity has not been established . . .").

[4] *"Nolle prosequi,"* is defined as "[a] formal entry on the record by the prosecuting officer by which he declares that he will not prosecute the case further . . . . ." Black's Law Dictionary 1070 (7th ed. 1999). Here, the prosecutor specifically claimed that the evidence did not establish factual innocence of Mr. Braunstein, and claimed that he could be re-indicted on the same charges in her papers. Other courts have held that a *nolle prosequi* is not a favorable termination, *see e.g.*, See *Simpson v. Denardo*, 2004 U.S. Dist. LEXIS 14816, 2004 WL 1737444 (D.Conn., July 29, 2004) ("A nolle prosequi does not qualify as a favorable termination for purposes of a malicious prosecution claim");

plaintiff bringing a malicious prosecution claim show "as a threshold matter, that the criminal proceeding was finally terminated." *Id.* Since the plaintiff failed to demonstrate that the dismissal of charges against him meets this finality requirement, his malicious prosecution claim was dismissed. *Id. See also, Hernandez v. City of Rochester*, 260 F. Supp. 2d 599, 615 (W.D.N.Y. 2003)("Where the prosecution did not result in an acquittal, it is deemed to have ended in favor of the accused . . . only when its final disposition is such as to indicate the innocence of the accused."); *Ayala v. KC Envtl. Health*, 2006 U.S. Dist. LEXIS 1419 (E.D.Cal. January 16, 2006) (dismissal without prejudice of criminal charges not favorable termination for malicious prosecution under § 1983); *Parr v. United States*, 351 U.S. 513, 76 S. Ct. 912, 100 L. Ed. 1377 (1956) (dismissal without prejudice not a final judgment).

Similarly, in *Jaffe v. Stone*, 18 Cal.2d 146, 149, 114 P.2d 335, 338 (1941), the California Supreme Court addressed the effect of dismissal of criminal charges on a malicious prosecution claim:

> It is not enough, however, merely to show that the proceeding was dismissed. The theory underlying the requirement of favorable termination is that it tends to indicate the innocence of the accused, and coupled with the other elements of lack of probable cause and malice, establishes the tort, that is, the malicious and unfounded charge of a crime against an innocent person. . . . Hence, if the criminal proceeding goes to trial, it is ordinarily

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Walsh v. Souza, 2004 U.S. Dist. LEXIS 5529, 2004 WL 717169 (D.Conn. May 25, 2004) ("A nolle prosequi is not a favorable termination of the type required to support a malicious prosecution claim").

necessary, as a foundation for a malicious prosecution suit, that the plaintiff have been acquitted. . . . The same fundamental theory is applied in testing a dismissal or other termination without a complete trial on the merits. If it is of such a nature as to indicate the innocence of the accused, it is a favorable termination sufficient to satisfy the requirement. If, however, the dismissal is on technical grounds, for procedural reasons, or for any other reason not inconsistent with his guilt, it does not constitute favorable termination.

As to matters terminated short of conclusion of trial, another court has explained:

> Whether or not the termination of an action prior to a determination on the merits tends to indicate innocence on the part of the defendant of the acts with which he is charged must depend on whether the manner of termination reflects on the merits of the matter. In some instances the manner of termination reflects the opinion of the court that the action lacks merit, as where criminal proceedings are dismissed for lack of sufficient evidence of guilt following a preliminary hearing. . . . In others, the termination reflects the opinion of the prosecuting party that, if pursued, the action would result in a decision in favor of the defendant, as where the district attorney seeks dismissal of the prosecution of a criminal action for lack of evidence . . . or where the plaintiff in a civil proceeding voluntarily dismisses the action . . .

Minasian v. Sapse, 80 Cal.App.3d 823, 827, 145 Cal.Rptr. 829, 832 (1978).

In *Michaels v. New Jersey*, 955 F. Supp. 315 (D.N.J. 1996), the court addressed the plaintiff's accrual of a § 1983 action premised on malicious prosecution. It held that a malicious prosecution claim does not accrue until there is a "final" and "dispositive" termination of the criminal proceedings in favor of the accused, such that it is no longer possible for an appeal or for a retrial of the criminal proceedings. *See* also, *Greenberg v. Wolfberg*, 890 P.2d 895, 904, n. 36 (Okla. 1994) ("A proceeding is not terminated until all appeals concerning the cause are concluded.") (citing Restatement (Second) of Torts § 659, comment f and § 674, comment j); *Hutchinson Travel Agency, Inc. v. McGregor*, 10 Kan. App. 2d 461, 701 P.2d 977, 979 (Kan. Ct. App. 1985) ("An action for malicious prosecution cannot be brought if the underlying action is still pending and undetermined."); *Moran v. Klatzke*, 140 Ariz. 489, 682 P.2d 1156, 1158-59 (Ariz. Ct. App. 1984) ("The majority rule prevents repetitive and unnecessary litigation. It would be a waste of judicial resources to allow the plaintiff in a malicious prosecution action to prosecute his claim only to have it rendered meaningless if later the appeal of the underlying action is decided against him."); Restatement (Second) of Torts § 674, comment j (1977) ("If an appeal is taken, the proceedings are not terminated until the final disposition of the appeal and of any further proceedings that it may entail.").

Although addressing an appeal of the underlying allegedly maliciously prosecuted case, the court in *Smith v. Hurd*, 699 F.Supp. 1433 (D.Haw. 1988) held that "the weight of authority in other jurisdictions holds that an action has not been favorably terminated until the time for appeal has passed or the appeal has been decided," citing *Moran v. Klatzke*, 140 Ariz. 489, 682 P.2d 1156 (1984). As the *Smith* court stated, "This rule promotes the interests of judicial

economy and consistency. Given the opposite rule, if the appellate court were to reverse the trial court in the underlying action, the trial court would face the dilemma of having either to allow both suits to proceed, or to dismiss the malicious prosecution action. Either course of action would result in confusion and an unwarranted waste of judicial resources."

In this case, the dismissal of the action without prejudice was not a favorable termination on the merits until the Ninth Circuit held that the prosecution of Mr. Braunstein was frivolous. Only at that time was it clear that he could not be prosecuted for the crimes for which he was indicted.

2. **The Element of "Lack of Probable Cause" Was Missing Until This Court's Ruling.**

As of October 3, 2000, one of the elements of his causes of action, lack of probable cause, was adjudicated against him in the context of the criminal case post-trial motion for attorney's fees. Thus, at that point, Mr. Braunstein had no cause of action at all, since the determination of a key element - the lack of probable cause – had been determined against him. Accordingly, his claim *still* had not accrued. Thus, although it seems generally accepted that the pendency of an appeal prevents a statute of limitations from running, only when this Court determined that the prosecution was frivolous did Mr. Braunstein then have both the elements of "favorable termination" and "lack of probable cause" and therefore the beginning of the statute of limitations.

B. <u>As A Practical Matter, Mr. Braunstein Could Not Have Brought His Claim Prior To This Court's Ruling On His Hyde Amendment Appeal.</u>

There was some discussion in the district court concerning the fact that Mr. Braunstein could have brought his claims between May 5, 1999 and October 3, 2000, notwithstanding the pendency of his Hyde Amendment motion for attorney's fees. One need only examine what would have happened in that event to determine that that argument is misplaced.

Had Mr. Braunstein filed an action prior to the district court's decision, it would have been dismissed as a matter of course, as soon as the district court handed down its October 3, 2000 ruling that (1) the prosecution was not frivolous and (2) was substantially justified, based on either claim or issue preclusion.

Any appeal of that dismissal would literally have been frivolous, given that the final order of the district court determined that there was probable cause for the prosecution. Thus, Mr. Braunstein could not have in good faith filed an appeal of the dismissal in the hope that the Ninth Circuit would reverse the district court on the Hyde Amendment Order. Even if this Court ultimately reversed that decision (as happened in this case), the reversal on appeal would not "reanimate" his dismissed claim. Thus, from a commonsense position, Mr. Braunstein's claims could only have accrued for statute of limitations purposes when the district court entered a new final order on September 25, 2002. Before then he had *no* cause of action.

C. <u>This Is More Analogous To Accrual Of A Malpractice Case.</u>

A classic problem in malpractice cases is to determine when the statute of limitations begin to accrue. The rule in Arizona is that the statute does not begin to accrue until there

has been a final adjudication of the underlying case, and damages become certain. *Amfac Distribution Corp. v. Miller*, 138 Ariz. 155, 673 P.2d 795 (1983). In *Amfac*, although the plaintiff knew that he had been damaged when his case was dismissed, the statute of limitations did not begin until the Court of Appeals had finally ruled. Thus, while litigation is ongoing, the statute does not begin until the litigation is finally resolved. *Id.* citing *Simmons v. Ocean*, 544 F.Supp. 841 (D.V.I.1982) (cause of action accrues when negligence becomes "irreversible" leaving plaintiff with "no remaining recourse"); *Webb v. Pomeroy*, 8 Kan.App.2d 246, 655 P.2d 465 (1982) (no cause of action until underlying lawsuit resolved). The important lesson from *Amfac* is therefore that until the damages become established, there is no cause of action. *See also*, *Glaze*, 207 Ariz. at 31.

In *Glaze*, a legal malpractice claim arising from an ineffective assistance of counsel claim, the court also discussed the policy reasons for such a rule, which are equally applicable here. Particularly, the court discussed the fact that a different determination of accrual could potentially require a plaintiff to file an action concerning the attorney's conduct while the underlying case was on appeal on an issue that might vindicate the challenged conduct. It was more efficient for the post-trial issues and their underlying appeal to be resolved, which would affirmatively determine the conduct upon which the malpractice claim was based. *Id.*

In *Sidney Coal Co. v. Massanari*, 221 F. Supp. 2d 755 (E.D. Ky 2002), the plaintiffs were harmed in 1993. Although they filed suit in 1999, well after the statute of limitations supposedly ran, the court held that although plaintiffs were harmed in 1993, they did not have a legally protected interest until the ruling by the Sixth Circuit Court of Appeals in 1999, and therefore, they were not entitled to

judicial relief and did not have a cause of action until that time.

In this case, Braunstein's damages were uncertain and speculative as long as the Hyde Amendment motion was pending. No matter what the basis of the district court's ruling on the Hyde Amendment motion, if the district court denied the pending motion, Mr. Braunstein could not assert either a *Bivens* or FTCA claim. Thus, only after the Ninth Circuit conclusively ended the issue were damages established and the cause of action accrued. As the Court stated in *Amfac*, "Apparent damage may vanish with successful prosecution of an appeal and ultimate vindication of the attorney's conduct by an appellate court." Similarly, the government's conduct may ultimately have been vindicated by the Ninth Circuit, with the result that there would be no cause of action. Moreover, as in *Glaze*, a *Bivens*/FTCA claim would necessarily be based on the very issues before the Ninth Circuit on the Hyde Amendment appeal – whether the prosecution was *trivolous*, vexatious or in bad faith. It would be inefficient to require a district court to make determinations on a separate case while those very issues were to be resolved by the Ninth Circuit. Accordingly, Braunstein's claims did not accrue until the resolution of the Hyde Amendment appeal and the claims are timely.

D. Policies Underlying The Statute of Limitations Militates For Renewal Here.

The oft-stated policies underlying a statute of limitations are:

> Any period of limitation . . . is understood fully only in the context of the various circumstances that suspend it from running against a particular cause of action. Although

> any statute of limitations is necessarily arbitrary, the length of the period allowed for instituting suit inevitably reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. In virtually all statutes of limitations the chronological length of the limitation period is interrelated with provisions regarding tolling, revival, and questions of application. In borrowing a state period of limitation for application to a federal cause of action, a federal court is relying on the State's wisdom in setting a limit, and exceptions thereto, on the prosecution of a closely analogous claim.

Chardon, 462 U.S. at 657, n. 9. Adopting Mr. Braunstein's theory of accrual is consistent with those policies underlying the statute of limitations.

First, the claim can hardly be called "stale." The government and Mr. Braunstein litigated the validity of the prosecution from the moment it was over through this Court's decision and the filing of this action. The facts of the case are established by the Ninth Circuit and there is no need for discovery of third party witnesses or evidence that may be affected by the passage of time. Thanks to the Ninth Circuit's opinion, virtually the only issue remaining is one of damages. There is no unfair surprise to the government concerning the existence of Mr. Braunstein's claim – it has been in litigation continuously since June 1999, when his Hyde Amendment Motion was filed.

Second, for the policy reasons set forth in *Glaze* and

Moran by the Arizona Supreme Court, while post-trial motions remain pending in the criminal case that can – as was the case here – actually resolve actions without requiring a party to file duplicative cases, judicial economy and efficiency results. Here, of course, the district court had the precise issues raised in Mr. Braunstein's subsequent action under consideration, *i.e.*, lack of probable cause and malice. Therefore, there should be no accrual of the statute of limitations while that motion remained pending in the district court.

CONCLUSION

For the foregoing reasons set forth herein, Mr. Braunstein's petition for writ of certiorari should be granted.

Dated: July 11, 2007

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DAVID T. BRAUNSTEIN, Plaintiff - Appellant, v. UNITED STATES POSTAL SERVICE; et al., Defendants - Appellees, and CHARLES SMITH, an individual, Defendant.

No. 05-16390

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2007 U.S. App. LEXIS 8831

March 7, 2007, Argued and Submitted, Phoenix, Arizona
April 12, 2007, Filed

NOTICE: [*1] PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

PRIOR HISTORY: Appeal from the United States District Court for the District of Arizona. D.C. No. CV-04-00401-NVW. Neil V. Wake, District Judge, Presiding.

COUNSEL: For DAVID T. BRAUNSTEIN, Plaintiff - Appellant: Philip H. Stillman, FLYNN & STILLMAN, Cardiff, CA.

For UNITED STATES POSTAL SERVICE, Defendant - Appellee: Elizabeth A. Weishaupl, Esq., USDE - OFFICE OF THE U.S. ATTORNEY, Denver, CO.

For DAREY CEROW, in her personal capacity, DEPARTMENT OF JUSTICE, UNITED STATES OF AMERICA, Defendants - Appellees: Michael C. Johnson, Esq., UNITED STATES ATTORNEY'S OFFICE, Denver, CO; Elizabeth A. Weishaupl, Esq., USDE - OFFICE OF THE U.S. ATTORNEY, Denver, CO.

DOES 1-20, inclusive, Defendant - Appellee: No appearance. No appearance; Michael C. Johnson, Esq., UNITED STATES ATTORNEY'S OFFICE, Denver, CO.

JUDGES: Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

OPINION

MEMORANDUM *

* This disposition is not appropriate for publication and is not precedent except as provided by *9th Cir. R. 36-3.*

[*2] Before: HAWKINS, THOMAS, and CLIFTON, Circuit Judges.

Plaintiff David T. Braunstein appeals from the district court's grant of summary judgment in favor of the defendants. We affirm.

Braunstein raises claims under the Federal Tort Claims Act ("FTCA") and *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971).* Two-year statutes of limitations govern the claims. *See 28 U.S.C. § 2401(b)* (FTCA claims); *Cholla*

Ready Mix, Inc. v. Civish, 382 F.3d 969, 974 (9th Cir. 2004) (*Bivens* claims in Arizona). FTCA claims accrue as a matter of federal law "when a plaintiff knows that he has been injured and who has inflicted the injury." *Winter v. United States, 244 F.3d 1088, 1090 (9th Cir. 2001)*. Similarly, "[a] *Bivens* claim accrues when the plaintiff knows or has reason to know of the injury." *W. Ctr. for Journalism v. Cederquist, 235 F.3d 1153, 1156 (9th Cir. 2000)*.

Braunstein's action is predicated on allegations of false arrest, malicious prosecution, and the intentional and negligent infliction of emotional distress. With regard to false arrest, **[*3]** the Supreme Court recently held that such claims require "detention *without legal process*" and accrue once legal process is initiated. *Wallace v. Kato, 127 S. Ct. 1091, 1095, 1096, 166 L. Ed. 2d 973 (2007)*. Braunstein was arrested only after indictment and was never detained without process. Therefore, he has no false arrest claim under either the FTCA or *Bivens*.

For the remaining legal theories, Braunstein was or should have been aware of his injuries once the allegedly wrongful prosecution was commenced against him. *Winter, 244 F.3d at 1090*; *W. Ctr. for Journalism, 235 F.3d at 1156*. His claims did not accrue at this time for statute of limitations purposes, however, because under the continuing torts doctrine this could not happen until the prosecution ended. *See Flowers v. Carville, 310 F.3d 1118, 1126 (9th Cir. 2002)* ("When a tort involves continuing wrongful conduct, the statute of limitations doesn't begin to run until that conduct ends.").

The district court dismissed the criminal case against Braunstein on May 4, 1999. Although his claims would appear to accrue at that point, Braunstein contends they did not, as the **[*4]** dismissal was without prejudice and the government could seek a new indictment to resume the prosecution. *See United States v. Hayden, 860 F.2d 1483, 1488 (9th Cir. 1988)* (noting that dismissal without prejudice allows the government "to

reindict based on the same or similar charges"). It is true, as Braunstein suggests, that malicious prosecution claims do not accrue until the underlying prosecution terminates in favor of the plaintiff. *Heck v. Humphrey, 512 U.S. 477, 484, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)*; *Hartman v. Moore, 547 U.S. 250, 126 S. Ct. 1695, 1702, 164 L. Ed. 2d 441 (2006)* (holding that the common law may provide "a source of inspired examples" useful for analyzing *Bivens* torts). Yet even if one could argue that Braunstein's prosecution did not terminate "in his favor" in May 1999, the threat of prosecution necessarily terminated when the limitations period ran out for prosecuting the alleged criminal acts. *See 18 U.S.C. § 3282(a)* (providing that "no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been **[*5]** committed"). Accordingly, the two-year limitations period governing Braunstein's claims started running no later than August 2001 and expired before Braunstein filed his action in February 2004. *28 U.S.C. § 2401(b)*; *Cholla Ready Mix, Inc., 382 F.3d at 974.*

Braunstein attempts to characterize our court's February 2002 decision regarding his Hyde Amendment motion for attorney's fees as the "favorable termination" of his prosecution. But a court's consideration of a motion to assess fees does not hold a case open. The allegedly malicious prosecution of Braunstein, including any risk that the prosecution might be resumed, terminated well before then. *See Budinich v. Becton Dickinson & Co., 486 U.S. 196, 200, 108 S. Ct. 1717, 100 L. Ed. 2d 178 (1988)* (holding as a general rule that "a claim for attorney's fees is not part of the merits of the action to which the fees pertain").

Alternatively, Braunstein argues that the limitations period was tolled by the district court's October 2000 denial of the Hyde Amendment motion and was reset by our court's reversal

of that decision. It might be true that the district court's denial of that motion doomed to failure any FTCA [*6] or *Bivens* action filed by Braunstein, because the district court's factual conclusions were inconsistent with the showings Braunstein would need to prevail in his civil claims. Nonetheless, Braunstein cites no authority to support the proposition that a limitations period is tolled because the prospects for success on a claim appear dim or even nil. This is not how statutes of limitations work. If Braunstein wanted to pursue a claim, he was required to file it before the limitations period expired.

That Braunstein later filed for bankruptcy also does not alter the fact that he failed to comply with the applicable limitations period. Braunstein cites no law or any other authority to support his contention that a bankruptcy filing tolls or resets a limitations period already set in motion by the accrual of a tort claim. The premise of Braunstein's argument is that his civil claims "did not exist" prior to this court's reversal of the district court's denial of attorney's fees. That, however, was not the case.

The Supreme Court's recent decision in *Wallace v. Kato* confirms that we should not infer tolling here. In *Wallace*, the Court held that a conviction will bar the filing [*7] of a related *42 U.S.C. § 1983* claim for false arrest but will not toll a statute of limitations that already has started to run. *127 S. Ct. at 1096.* If a conviction doesn't toll the limitations period for a false arrest claim, even though it bars the claim, then a bankruptcy filing or a denial of a motion for fees under the Hyde Amendment won't toll the limitations period, either.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

David T. Braunstein, Plaintiff.	) No. CV-04-0401-PHX-NVW ORDER
vs.	)
United States Postal Service; CharlesSmith: Darcy Cerow, Department of Justice; United States of America: and DOES 1 through 20 inclusive;	)
Defendants.	)

The court has before it Defendants United States Postal Service ("USPS"), Charles Smith, and United States Department of Justice's ("USDOJ") Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. #24), Defendant Darcy Cerow's Motion to Dismiss or in the Alternative, for Summary Judgment (Doc. #25), Plaintiff David Braunstein's corresponding responses, Defendants Cerow, USPS, and USDOJ's Supplemental Brief in Support of their Motion to Dismiss (Doc. #58), and Plaintiffs Amended Supplemental Memorandum of Points and Authorities in Opposition to Defendants' Motions to Dismiss.

1. Background

On December 11.1997. Plaintiff was indicted for wire fraud, interstate transportation of goods obtained by fraud, and money laundering. (Am. Compl. ¶ 37.) On May 4. 1999,

the Government moved to dismiss the indictment and the district court granted that request. (Id ¶ 43.) Two months later Plaintiff filed a motion for attorney's fees under the Hyde Amendment ("Hyde Amendment motion"), which can be found at Title VI, Section 617 of Public Law 105-199, 111 Stat. 2519. (Id. ¶ 44.) The Hyde Amendment allows courts to award attorney's fees to criminal defendants not represented by public defenders if the Defendant prevailed and the Government's position is found to be vexatious, frivolous, or in had faith. The district court denied Plaintiffs Hyde Amendment Motion on October 3. 2000.(Id., 45.) Plaintiff appealed and the U.S. Court of Appeals for the Ninth Circuit issued an opinion reversing the district court on February 25, 2002. (Id. ¶ 46). The Government's Petition for Rehearing was denied on March 15, 2002, and the Ninth Circuit's mandate issued on June 26. 2002. (Id. 949.)

On February' 25, 2004, exactly two years after the Ninth Circuit opinion awarding his attorney's fees, Plaintiff filed the present action. (Compl. at I.) Plaintiff simultaneously filedadministrative claims under 28 U.S.C. § 2675(a) of the Federal Tort Claims Act ("FTCA") with the USDOJ and the USPS. In May 2004, both agencies denied Plaintiffs claims. The only remaining claims in this action are ones for false arrest, unconstitutional seizure, malicious prosecution, and attempted suppression of exculpatory evidence against Cerow and Smith pursuant to *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 402 U.S. 388 (1971), and a FTCA action for false arrest, malicious prosecution, intentional infliction of emotional distress and negligent infliction of emotional distress against the USDOJ and the USPS. (P1. Resp. at 4-6). The Defendants have filed motions to dismiss, or in the alternative, motions for summary judgment, on various grounds, although Defendant Cerow filed a separate motion.

II. Legal Analysis

Defendants USPS. Smith, and USD0J argue that the FTCA claims should be dismissed because they are barred by the statute of limitations. The FTCA provides claimants a two-year statute of limitations from the date the cause of action accrues. 28 U.S.C. § 2401(b); *Zavala v. United States*, 876 F.2d 780, 782 (9th Cir. 1989). Defendant Cerow argues that Plaintiff's *Bivens* claim is barred by the statute of limitations. The statute of limitations for a *Bivens* action is governed by the forum state's statute of limitations for personal injury actions, which is two years in Arizona. *Van Strum v. Laawn*, 940 F.2d 40, 409-10 (9th Cir. 1991) (holding that the statute of limitations for Bivens actions is the same as for § 1983 actions); *Owens v. Okure*. 488 U.S. 235, 251 (1989) (holding that the state's personal injury statute of limitations applies to § 1983 claims); A.R.S. § 12-542 (requiring personal injury actions to be commenced within two years).

A. The running of the statute of limitations between May 4, 1999 and October 3, 2000

All Defendants argue that the appropriate accrual date is May 4, 1999, which is the date on which the indictment against Plaintiff was dismissed. In *Heck v. Humphrey*, 512 U.S. 477. 489 (1994), the Supreme Court held that a prisoner's § 1983 action that implicates the validity of his criminal conviction or sentence does not accrue "until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.' The holding in Heck dictates accrual dates for both FTCA and Bivens claims that implicate the validity of a criminal charge. *Erlin v. United States*, 364 F.3d 1127, 1133 (9th Cir. 2004) (FTCA claims); *Martin v. Sias*, 88 E.3d 774. 775 (9th Cir.

1996) (Bivens claims). *Heck* applies not only to convictions, hut also to dismissed criminal charges. *Harvey v. Waldron*, 210 F.3d 1008. 1014-15 (9th Cir. 2000). In accordance with *Heck*. Plaintiffs claim accrued on May 4. 1999.

Plaintiff initially disputed the May 4, 1999 accrual date. lle argued that the statute of limitations did not begin to run until the Ninth Circuit's reversal because until then he was barred by res judicata from bringing the FTCA and Bivens actions. He argued that the filing of the Hyde Amendment motion precluded him from filing claims for false arrest and malicious prosecution because these claims require him to show his prosecution lacked probable cause. see *Reams v. City of Tucson*, 145 Ariz. 340. 343, 701 P.2d 598, 601 (App. 1985) (holding that defendant has the burden of showing the arrest was founded upon probable cause after a plaintiff shows he was not arrested pursuant to legal authority); *Slade v City of Phoenix*, 112 Ariz. 298, 300, 541 P.2d 550, 552 (1975) (explaining that one of the elements of a claim for malicious prosecution is that the prosecution lacked probable cause), and the district court would have to decide whether probable cause existed in ruling on the Hyde Amendment motion. The term "res judicata" may refer specifically to claim preclusion or to both claim preclusion and issue preclusion. *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75. 77 n. 1(1984). Claim preclusion "prohibits lawsuits on 'any claims that were raised or could have been raised' in a prior action. *Stewart v. U.S. Bancorp*, 297 F.3d 953. 956 (9th Cir. 2002) (citations omitted) The plain language of Plaintiffs argument that he "was precluded from pursuing a claim for any cause of action premised on the lack of probable indicates he is alleging claim preclusion. Plaintiff must have mischaracterized his argument because claim preclusion obviously did not operate to bar the claims he now asserts. Plaintiff was not able to bring a civil suit for

false arrest or malicious prosecution as part of his criminal case generally or as part of his Hyde Amendment fee motion specifically. Even when Plaintiff filed his motion for attorney's fees in his criminal case, he could not have also asserted civil actions for wrongs allegedly committed against him in connection with the criminal prosecution.

Despite the use of the phrase "cause of action" in his briefs, the substance of Plaintiffs argument is that issue preclusion prevented him from bringing his current claims. Issue preclusion prevents relitigation of all "issues of fact or law that were actually litigated and necessarily decided" in a prior proceeding. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). Issue preclusion is appropriate when 1) there was a full and fair opportunity to litigate the issues in the previous action; 2) the issue was actually litigated; 3) the issue was lost as a result of a final judgment in that action; and 4) the person against whom issue preclusion is asserted was a party or in privity with a party in the previous action. *In re Palmer*, 207 F.3d 566, 568 (9th Cir. 2000). The substance of Plaintiffs initial argument was that issue preclusion prevented him from bringing his FTCA and Bivens causes of actions against Defendants until after the Ninth Circuit's reversal.

Plaintiff has since agreed that "with the dismissal of the criminal prosecution on or about May 4, 1999, [he] could clearly have brought this claim." (Pl. Am. Supp. Mem. at 4.) The parties therefore agree that the statute of limitations for Plaintiffs claims began running on May 4, 1999. Plaintiff maintains, however, that once he filed the Hyde Amendment motion he was precluded from filing the FTCA and Bivens causes of action and the statute of limitations stopped running. The filing of the motion, however, did not bar Plaintiff from bringing related causes of action that provided

a first remedy for some of his injuries and an alternative remedy for his attorney's fee claim. Issue preclusion prevents parties from relitigating issues that were actually litigated and decided. *Robi*, 838 F.2d at 322. It does not prevent them from filing actions that may be affected by other pending actions. Thus, at a minimum, the statute of limitations ran uninterrupted for seventeen months - from May 4, 1999, to October 3. 2000, when the district court denied the Hyde Amendment motion for award of attorney's fees, arguably concluding by implication that the prosecution had probable cause.

B. The effect of the district court's ruling on the statute of limitations

Plaintiff next argues that the district court's denial of his Hyde Amendment attorney's fee motion precluded him for bringing this action, as it was an adjudication that the prosecution had probable cause. Defendants respond that the ruling did not collaterally estop Plaintiff because the issue of probable cause was not actually litigated or decided by the district court. Defendants correctly point out that nowhere in Plaintiffs briefs in support of his Hyde Amendment motion or in the district court's order was the phrase "probable cause" used. The district court did find that Plaintiff had failed to prove "that the prosecution was vexatious." Vexatiousness has been defined by the Ninth Circuit as meaning "without reasonable or probable cause or excuse." *United States v. Sherburne*, 249 F.3d 1121, 1126 (9th Cir. 2001). Thus, even though the district court did not explicitly use the words "probable cause," a finding of probable cause may be implicit in its ruling that the prosecution was not vexatious. This issue need not be resolved, however, because even if the district court's finding was an adjudication of probable cause, Plaintiff's action is still untimely.

All the parties agree that Plaintiff was no longer barred from bringing the claims asserted in this action when the Ninth Circuit reversed the district court and held the Hyde Amendment motion for attorney's fees meritorious. The reversal also restarted the running of the statute of limitations. Plaintiff then had seven months remaining to file suit, as seventeen months had run previously. Neither counsel nor the court has identified any authority for the proposition that the statute of limitations resets to zero after expiration of an intervening event that has suspended its running. The only analogous Arizona statutes of limitations suspend the running due to certain intervening events and then start counting from the time at which they were suspended. For example, the statute of limitations for service of process is suspended when a defendant is out-of-state but begins running again when she returns to the state. A.R.S. § 12-501. When a person with a personal injury action dies, the statute of limitations is suspended for four months but resumes thereafter. A.R.S. § 14-3802.

In neither of these situations is the statute of limitations reset to zero after the intervening event. In the absence of any authority to deviate from the normal application of tolling by an intervening event alter the statute has begun to run, the court finds that the statute of limitations did not reset to zero upon the issuance of the Ninth Circuit's opinion or of its mandate, whichever it may be. Thus, even assuming that the district court's decision precluded Plaintiff from bringing the current claims and stopped the statute of limitations, the Ninth Circuit's reversal lifted any preclusion, and Plaintiff had seven months from Februay 25 or June 26, 2002, to file suit within the two-year limitation period. He did not file this action for twenty-four months after the Ninth Circuit's decision and twenty months after its mandate. By either measure this action is untimely.

C. The finality of Plaintiffs claims

In his supplemental briefing after the hearing on the Defendants' motions, Plaintiff alternatively argues—in apparent contradiction to his concession at oral argument—that his action is timely because the elements of his claim were not final until the Ninth Circuit reversed the denial of his Hyde Amendment fee application. His new argument is that the damages were not certain until after the appeal. He relies on that Arizona rule that in legal malpractice arising from litigation the client's actual injury or damages are not certain until after the appeal. *See Glaze v. Larsen*. 207 Ariz. 26, 83 P.3d 26 (2004); *Amfac Distribution Corp. v. Miller* 138 Ariz. 155. 673 P. 2d 795 (App.) (*Amfac I), approved as supplemented,* 138 Ariz. 152. 673 P.2d 792 (1983) (Amfact II).

That line of cases is inapplicable here. When a legal malpractice claim arises during the course of litigation, the client's damages in the failed underlying litigation are speculative until that litigation is concluded (that is, the appeal is exhausted) because until then the client could still prevail despite the attorney's malpractice. *Amfac II*. 138 Ariz. at 154, 673 P.2d at 794. A claim of legal malpractice requires not just the negligence itself; but also actual injury or damage caused by the negligence. Id. 138 Ariz. at 153.673 P.2d at 793. Thus, the claim does not accrue until the malpractice actually damages the client, which is not until the underlying litigation is concluded.

Defendants' liability and Plaintiffs injuries and damages in this case were fixed no later than when the charges against Plaintiff were dismissed. Nothing later could have undone any of Plaintiffs injuries, so no analogy holds to legal malpractice, wherein the causal connection between the

attorney's negligence and the client's injury may yet be broken the appeal turns the client's underlying defeat into an underlying victory on other grounds, which can happen notwithstanding the attorney's negligence.' The Hyde Amendment motion at most offered Plaintiff an alternative route to compensation for the attorney's fees portion of his injuries. The Hyde Amendment motion and the claims now asserted in this action offered alternative remedies for having paid attorney's fees, and both remedies could have been pursued simultaneously.

As to all other elements of Plaintiffs damages, the Hyde Amendment motion offered no remedy at all. The Ninth Circuit's opinion did not resolve any uncertainty about whether Plaintiff was injured in any respect. It merely compensated him in one respect. Thus, all of the elements of Plaintiffs claims existed upon dismissal of the charges against him, and his causes of action accrued at that time.

D. The effect of Plaintiff's bankruptcy on the statute of limitations

Plaintiffs final argument for timeliness is that his December 2000 bankruptcy stopped the running of the statute of limitations until February 2004. At oral argument on these motions, Plaintiffs counsel agreed that if the statute of limitations began running on May 4, 1999 the tolling provisions of the bankruptcy code would not save the case. He again raises the argument that there was no claim until after the Ninth Circuit's decision because the damages were not final and therefore no claim that the bankruptcy trustee could have brought. As already addressed, the elements of Plaintiffs claims were certain at the time the indictment was dismissed. The court has nonetheless reviewed 11 U.S.C. §

108(a) and (b) and concluded that these provisions are insufficient to save the timeliness of this action for

the reasons briefed by the Defendants and originally conceded by Plaintiff at oral argument. Thus, Plaintiffs bankruptcy does not save the claims from the statute of limitations.

IT IS THEREFORE ORDERED that Defendants United States Postal Service ("USPS"). Charles Smith, and United States Department of Justice's ("USDOJ") Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. #24) and Defendant Darcy Cerow's Motion to Dismiss or, in the Alternative, for Summary Judgment (Doc. # 25) are granted.

IT IS FURTHER ORDERED that the Clerk shall enter summary judgment against Plaintiff that Plaintiff take nothing and that the Clerk shall terminate this case.

DATED this 14ih day of June. 2005.

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Neil V. Wake
United States District Judge